Supreme Court, U.S.
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No. 01-1401

IN THE

Supreme Court of the United States

GARY R. WALL, WILLIAM COOKSEY, SR., and STEPHEN MANOS,

Petitioners,

v.

ROBERT M. CHEVERIE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief In Opposition For Respondents Robert M. Cheverie, Charles Leconche, Dominick-Lopreato, John Pezzente, Laborers' International Union Of North America, Vere O. Haynes, Michael S. Bearse, General Counsel, LIUNA, Frank Freeman, And Laborers' Local 230

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STATEMENT OF THE CASE

I. *Nature of the Case*

Pro Se Petitioners' Second Amended Complaint, dated August 30, 1999, sought to allege a cause of action under the civil remedy provision of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c) (A-118). Plaintiff-Appellant-Petitioners' Second Amended RICO Complaint alleged that they have been deprived of their "*intangible property rights*," their "*right to union membership*", their right to "*employment*", their "*LMRDA right to self determination*," and their "*constitutional right to due process.*"

The Second Amended Complaint invoked the District Court's jurisdiction "*pursuant to 18 U.S.C. § 1964(c) for violation of 18 U.S.C. § 1962(b)(c)(d) and violations of 18 U.S.C. § 1961(1)(5).*" The Second Amended Complaint defined the "Nature of the Case" as an action "*against an enterprise [18 U.S.C. § 1961(4)] and the entities that are part of the enterprise [18 U.S.C. § 1961(3)] and the defendant persons [18 U.S.C. § 1961(3)] that are associates of the said enterprise.*" Claim One of the Second Amended Complaint asserted violations of numerous statutes "*in the control and maintenance of [18 U.S.C. § 1961(4)]*, a RICO enterprise. The second claim of the two count Second Amended Complaint asserted Defendant Luskin "*violated the procedural due process clause of the fourteenth amendment of the United States Constitution violating the constitutional right of the plaintiffs in the District and Commonwealth of Connecticut.*"

The three Pro Se Plaintiff-Appellants-Petitioners include Gary Wall and William Cooksey, Sr., former members of Defendant Laborers' Local 230 (having voluntarily relinquished

their membership for non-payment of required dues payments in 1990 and 1992, respectively), and Pro Se Plaintiff Stephen Manos, a retired member of Local 230.

On August 30, 1999, Petitioners brought their Pro Se Second Amended RICO action against the Laborers' International Union of North America ("LIUNA"), Laborers' Local Union 230 ("Local 230"), Charles LeConche (Business Manager of Local 230 since 1995), John Pezzente (Secretary-Treasurer of Local 230), Dominick Lopreato (former member and Business Manager of Local 230, resigned 1995), Frank Freeman (Sergeant-at-Arms of Local 230 and, since 1998, an Executive Board member of Local 230), Harriet Roman (office secretary of Local 230),[1] Vere O. Haynes (Third Vice President of LIUNA), Michael S. Bearse, Esq. (General Counsel for LIUNA), Robert Luskin, Esq. (General Executive Board Attorney for oversight and implementation of Union Ethics and Disciplinary Procedures since 1995), and Robert M. Cheverie Esq. (a labor lawyer representing many unions, including Laborers' Local 230).

The law firm of Robert M. Cheverie & Associates, P.C. represents all the Defendant-Appellee-Respondents with the exceptions of the Defendant identified as the "Luskin/Coia/ Lopreato Group," and Robert Luskin, who is represented by Attorney Terrance G. Reed. Plaintiffs refer to the alleged Luskin/Coia/Lopreato group "L.C.L." as "The Enterprise." Such defendant does not and has never existed. Moreover, no factual assertions within the Second Amended Complaint or other assorted pleadings explain the actual existence of this alleged defendant.

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1. At Oral Argument held on June 19, 2000 on the Defendants' Motion to Dismiss, Plaintiffs stipulated to the withdrawal of Harriet Roman as a defendant.

II. *Proceedings Below*

Petitioners' endeavor at a RICO action began with Plaintiff Gary Wall's Pro Se attempt to plead a self styled "RICO Injunction" filed on December 1, 1997. The District Court determined that among the shortcomings of this effort was Plaintiff Wall's failure to make a showing of irreparable harm. Additionally, by Ruling dated March 27, 1998, the District Court dismissed Plaintiff Wall's action because he "failed to meet his pleading requirements under RICO, ..." Specifically, the District Court entered an Order granting the Respondents' Motion to Dismiss for failure to state a claim because the alleged perjury did not constitute a predicate act under RICO. Plaintiff Wall was given leave to amend his Complaint by no later than April 22, 1998, but such leave was conditioned upon his compliance with the District Court's standing order in RICO Cases. Judgment, pursuant to Court Order dated March 27, 1998, was entered in Defendants' favor on March 31, 1998.

On the Court ordered deadline, April 22, 1998, Plaintiff Gary Wall, now joined by William Cooksey, Sr., filed (*Pro Se*) a document styled "*Standing Order Pursuant to 18 U.S.C. § 1964 Civil RICO, Subject to Fed.R.Civ.P. Rule 11*" along with a document styled "*Motion to Add to the Amended Complaint*" which purported to add various new defendants and the new plaintiff, William Cooksey. However, despite the clear and unambiguous Ruling dated March 27, 1998, the Plaintiff did not file an Amended Complaint. The Defendant-Respondents, concerned that the District Court might construe Pro Se Plaintiffs' unusual filing as a "complaint", again requested, by motion filed June 29, 1998, that Plaintiff's action be dismissed, in part, for failure to comply with the District Court's March 27, 1998 Order.

The Court Clerk would not docket the Defendant-Respondents Motion to Dismiss because the original action had been dismissed pursuant to the District Court's Ruling dated March 27, 1998 and Plaintiff, contrary to the District Court's Ruling, failed to file an Amended Complaint. Therefore, technically no Complaint existed at that time to consider dismissing. Defendants' Motion to Dismiss was rendered moot in light of the District Court's subsequent Ruling dated July 9, 1998.

At a status conference attended by the parties on July 6, 1998, the District Court granted Plaintiff-Petitoner Wall another opportunity to file an Amended Complaint. The District Court explained to Plaintiff Wall his specific pleading obligations. The District Court, by written Ruling dated July 9, 1998, stated that "*no later than August 3, 1998*" Plaintiff's Motion to Add Additional Parties must be filed. The Court further instructed that: "*Accompanying any Motion to Add Additional Parties should be a proposed Amended Complaint which would contain allegations concerning all of the present, as well as the proposed new parties.*"

The August 3, 1998 deadline passed without Plaintiff-Petitioner Wall serving his proposed Amended Complaint on the Defendants. Accordingly, Defendants, by Motion filed August 24, 1998, requested that the District Court dismiss the action because he had not served a proposed Complaint upon the Defendants as instructed by the Court.

Despite Plaintiff Wall's failure to abide by the District Court's Ruling dated July 9, 1998, the District Court, by Ruling dated September 24, 1998, denied Defendants-Respondents' Motion to Dismiss and granted Petitioners Motion to Add Additional Parties. In particular, the District Court ruled that Plaintiff Wall could add as

defendants Robert Luskin, Vere O. Haynes, Dominick Lopreato, John Pezzenti, Laborers' International Union of North America, and Laborers' Local 230 and, as plaintiffs, William Cooksey, Sr. and Stephen Manos. In addition, the Ruling dated September 24, 1998 permitted Plaintiff-Petitioner Wall to file an Amended Complaint no later than October 7, 1998. Pro Se Plaintiff-Petitioners Wall, Cooksey and Manos filed a timely Amended RICO Complaint.

By Motion dated November 30, 1998, Defendant-Respondents once again requested that the District Court dismiss Plaintiff-Petitioners' RICO Complaint because Plaintiffs' Complaint failed to allege, as to any of the Defendants, a pattern of racketeering activity or an injury from any alleged RICO violations by Defendants. Moreover, Defendants argued that most of the allegations referenced in the Complaint were barred by the applicable four-year statute of limitations.

By Ruling dated July 29, 1999, the District Court granted the Defendants'-Respondents' Motion to Dismiss because Plaintiffs failed to allege facts that could allow a reasonable finder of fact to find that any of the Defendants named in the Complaint had engaged in a "*pattern of racketeering activity*" or "*to support a conclusion that any actions by the Defendants induced any of the Plaintiffs to part consensually with any of their property, including their right to democratic participation in their union's affairs.*" Moreover, the District Court noted that much of the allegations were time barred under the applicable four-year statute of limitations. In addition, the allegations that did fall within the statute of limitations period did not constitute "*predicate acts*" or represent "*related acts*" that "*amount to, or pose a threat of, continuing criminal activity*" pursuant to the RICO statute. Likewise, the District Court found Plaintiffs' allegations of assault and of mail and wire fraud similarly insufficient.

However, because the Plaintiffs are Pro Se, the District Court allowed them "*one **final** opportunity to replead their claims.*" The District Court instructed Plaintiffs that in such repleading the defects in their Amended Complaint specifically identified in the District Court's Ruling dated July 29, 1999 must be remedied.

Plaintiff-Petitioners' Second Amended Complaint was filed on August 30, 1999. At that time, Plaintiffs motioned the Court to add Defendants Michael S. Bearse and Frank Freeman. By Ruling dated September 21, 1999, the District Court granted Plaintiffs' request. All of the Defendants, with Defendant Luskin represented and filing separately, moved to dismiss the Second Amended Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6).

Defendant-Respondents argued for the third time that Plaintiffs' pleadings failed to allege a cognizable RICO violation. Defendants specifically noted that, in particular, the pleadings failed to allege as to any defendant a pattern of activity considered a predicate act under RICO or an injury from any alleged RICO violation by Defendants. Defendants again argued that in order to prove a "pattern of racketeering," a "plaintiff must plead at least two predicate acts and must show that the predicate acts are related and that they amount to, or pose a threat of, continuing criminal activity." *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 465 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S. Ct. 2547, 135 L. Ed. 2d 1067(1996).

Plaintiff-Petitioners sought additional discovery in an effort to save their deficient third attempt at drafting a RICO Complaint. Defendants-Respondents filed a motion to stay discovery until after a ruling on the pending motions to

dismiss. By Ruling dated February 14, 2000, the District Court denied Defendants' Motion to Stay Discovery.[2]

Oral Argument was held on the Motions to Dismiss on June 19, 2000.[3] The District Court, in repeated deference to the Plaintiffs' Pro Se status, reviewed and considered all of the Plaintiffs' numerous filings in deciding the Defendants' Motion to Dismiss. By Ruling dated July 11, 2000, the District Court granted Defendants' Motion to Dismiss Plaintiffs' Second Amended RICO Complaint with prejudice and granted leave to Plaintiffs to replead the Constitutional due process claim (Second Count of the Complaint) against Defendant "Luskin *only*." The District Court ruled that Plaintiffs failed to adequately plead a "*pattern of racketeering activity*." Specifically, the Plaintiffs failed to adequately plead "*two predicate acts*" committed by any of the Defendants. They failed to assert that the alleged improper acts were "*related*." Additionally, no specific facts pled by the Plaintiffs suggested that the alleged improper acts committed by the Defendants amounted to or "*pose a threat of continuing criminal activity*." As noted by the District Court:

> Despite the court's efforts to explain to the plaintiffs that they must allege facts to support

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2. Plaintiff-Appellants assert that "Plaintiffs were allowed by the Court to take one non-party discovery of Mr. Nobili" (*See* Appellants' "Appeal in Memorandum Form," p. 10, 02/02/01). Plaintiffs were free to take additional discovery consistent with the District Court's Ruling dated February 14, 2000, but did not.

3. The two motions to dismiss under consideration on June 19, 2000 were the one filed on behalf of all of the Defendants represented by the law office of Robert M. Cheverie & Associates, P. C. and the one filed by Attorney Terrance Reed on behalf of Defendant Luskin.

> *all* of the elements of a RICO cause of action, the plaintiffs have continued to insist that all they must allege to state a claim under RICO is the existence of an "enterprise." The plaintiffs have not remedied the pleading deficiencies with respect to their RICO claim that the court specifically identified in its July 1999 Ruling. The plaintiffs were advised in July of 1999 that they would only be allowed "one *final* opportunity" to replead their claims if they had a proper basis to do so. *See* Ruling [Dkt.No.97] at 6 (emphasis in original). They have not done so. The court therefore dismisses with prejudice the plaintiffs' RICO claim as to all defendants.

(Pet. Supp. App. B38).

Judgment entered, with prejudice, against Plaintiff-Petitioners' Second Amended RICO Complaint on July 14, 2000 (Pet. Supp. App. B51-B52). The Second Circuit heard argument on August 29, 2001 and, by Summary Order dated September 6, 2001, affirmed the judgment of the District Court stating that: "*The District Court properly dismissed the RICO complaint based on its conclusion that the plaintiffs had not established the elements of a RICO claim.*" Pet. App. A6. Plaintiff-Appellants' Petitions for panel rehearing and petition for rehearing en banc were denied by Order dated November 15, 2001. Pet. App. A10-A11. The instant Petition for Certiorari (Docket No. 01-1401) was filed on February 8, 2002 and placed on the docket March 22, 2002. Additionally, Plaintiffs' accompanying Petition for Writ of Mandamus (Docket No. 01-1402) was filed and docketed on the same dates.

REASONS FOR DENYING THE WRIT

The central question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of the Pro Se Plaintiff-Petitioners' Second Amended RICO Complaint ("Complaint" or "Third Version Complaint") "conflicts" with the holdings of this Court and/or Circuit Court opinions. (Pet. at *i-iii*).

The Second Amended Complaint sought to allege a cause of action under the civil remedy provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1964(c). Pet. Supp. App. B5. The components of a proper claim under RICO are as follows: (1) that the defendant; (2) through the commission of two or more acts; (3) constituting a pattern; (4) of racketeering activity; (5) directly or indirectly invests in, or maintains an interest in; (6) an enterprise; (7) the activities of which affect interstate or foreign commerce. *DeFalco v. Dirie*, 923 F. Supp. 473, 476 (S.D.N.Y. 1996) (citing *Moss v. Morgan Stanley*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)).

The District Court, in dismissing the Second Amended Complaint, admonished that, *"Despite the court's efforts to explain to the plaintiffs that they must allege facts to support all of the elements of a RICO cause of action, the plaintiffs have continued to insist that all they must allege to state a claim under RICO is the existence of an 'enterprise.'"* Pet. Supp. App. at B38. Nonetheless, the Petition argues that the Court's dismissal of the Second Complaint without considering the enterprise element "conflicts" with this Court's precedent. Pet. at 17.

Pro Se Petitioner's arguments are without merit. The Second Circuit upheld the District Court's dismissal of the third version complaint because the Pro Se Plaintiffs repeatedly failed to establish the elements of a RICO claim. Pet. Supp. App. B33; Pet. App. at A4, A6. A cause of action consisting of several elements does not survive if ***any*** of the necessary elements are inadequately pled. Because Petitioners failed to state a claim, the Court is under no obligation to consider any portion of their argument. In this regard, even if the Pro Se Petitioners had sufficiently pled the "enterprise element" of their endeavored RICO action (they did not), their failure to sufficiently plead the remaining necessary elements is fatal to their claim.

The Second Circuit correctly decided the case, and the Ruling does not contradict this Court's opinions or any of the Circuit Court decisions identified in the Petition. Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE SECOND CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

The first question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Claim One of Pro Se Plaintiffs' Second Amended Civil Rico Complaint "conflicts" with this Court's decisions in *Sedima, S.P.R.L. v. Imrex Company, Inc., et al.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) and *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Pet. at *i.* Petitioners argue that the District Court, in not considering the "enterprise element" because the Complaint did not adequately allege "two predicate act" violations and did not adequately plead the "pattern of

racketeering element" requirement, contravened this Court's holdings in *Sedima* and *Turkette*. Pro Se Petitioners' "concise" argument, in similar fashion to their Second Circuit argument, fixes on only one of the necessary elements of an adequately pled RICO cause of action, i.e., the "enterprise" element. Pet. at 10-11. Petitioners' argument misconstrues this Court's holdings and is without merit.

The fallacy of Pro Se Petitioners' argument is demonstrated in this Court's opinion in *Sedima*. The Court in *Sedima* opined:

> A violation of Section 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *The plaintiff must of course, allege each of these elements to state a claim* (emphasis added). Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of Section 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. . . .
>
> But the statute requires no more than this. Where the plaintiff alleges *each element of the violation*, (emphasis added) the compensable injury necessarily is the harm caused by the predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in

> Section 1962(c), "an activity which RICO was designed to deter."

Sedima, 473 U.S. 479, 498, 105 S. Ct. 3275, 3285 (1985).

The Second Circuit upheld the District Court's dismissal of Pro Se Petitioners' third version RICO Complaint because the Pro Se Plaintiffs continually failed, despite numerous instructions from the Court, to allege sufficient facts to establish the necessary minimum "two predicate act" violations essential for a RICO cause of action. Pet. Supp App. B33; Pet. at A4. Additionally, the Second Circuit affirmed the District Court's dismissal of the third version complaint because the Pro Se Petitioners did not satisfy the "pattern of racketeering activity" element of a cognizable RICO action. Pet. Supp. App. at B33, B37-38; Pet. at App. A4, A6.

Petitioners' argument contravenes the very case law upon which their argument purports to rely. Petitioners' argument ignores the requirement that *all* elements of a RICO action must be sufficiently pled in order to survive a F.R.C.P. 12(b)(6) motion to dismiss (Pet. at 17). Pro Se Petitioners assume that the *Sedima* decision requires that the Court address the "enterprise element" of RICO even when the requisite two predicate acts violations required by the statute have not sufficiently been pled and/or when the necessary "pattern element" is insufficiently pled. Pet. at 17.

Similarly, Pro Se Petitioners assume that the *Turkette* decision requires that the Court find a cognizable RICO action even in the absence of the minimal two requisite predicate acts and/or a sufficiently pled "pattern of racketeering activity" element. *Id.* The Court's decision in

Turkette is not supportive of Petitioners' argument. Rather, the Court in *Turkette* held that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises and thus reversed the First Circuit's opinion that Congress did not intend to include within the definition of "enterprise" those organizations that are exclusively criminal. *Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981). Additionally, the Court in *Turkette* noted in reversing the First Circuit that considering a wholly criminal enterprise within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." With respect to Section 1962(c), an "enterprise" is not a "pattern of racketeering activity" but is an entity separate and apart from the pattern of activity in which it engages. With regard to these two distinct RICO elements, the Court in *Turkette* held:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. . . .

Turkette, at 583, 101 S. Ct. at 2528-9.

This Court's opinions in *Sedima* and *Turkette* contradict rather than support Pro Se Petitioners' suppositions. Simply stated, the *Sedima* and *Turkette* opinions do not require a

court to sustain a civil RICO complaint scarce of factual pleadings sufficient to establish violations of two predicate acts and/or the "pattern of racketeering" element, regardless of the nature of the "enterprise."

The Second Circuit's Ruling does not contradict this Court's opinions in *Sedima* and *Turkette*. Accordingly, the first question presented by the Petition does not raise a conflict with established precedent of this Court. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

II. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH SECOND CIRCUIT PRECEDENT.

The second question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Claim One of Pro Se Petitioners' Second Amended Civil Rico Complaint "conflicts" with Second Circuit precedent regarding the "enterprise" and "pattern" requirements of the RICO Act as to call for the exercise of the United States Supreme Court's supervisory power. Pet. at *ii*.

Without any explanation, Pro Se Petitioners assert that the Second Circuit's Ruling affirming the District Court's dismissal of their third version civil RICO Complaint presents a conflict worthy of this Court's intervention. Pet. at 17. Specifically, Petitioners assert that the Decision contradicts the earlier Second Circuit opinions of *United States v. Indelicato*, 865 F.2d 1370 (1989); *United States v. Ianniello*,

808 F.2d 184 (1986); and *United States v. Weisman*, 624 F.2d 1118 (1980). *Id.* at 18. Petitioners' assert that the impermissible conflict stems from the Second Circuit's affirmation of the District Court's reasoning that because Plaintiffs failed to allege sufficient facts to establish two predicate acts, the Court need not consider whether the Plaintiffs have met the other elements of a RICO claim. Pet. at 14, 17-18. Petitioners do not take direct aim at the District Court's reasoning in dismissing their third version Complaint, i.e. their failure to adequately allege sufficient facts to establish two predicate acts or the necessary RICO element of a "pattern of racketeering activity." Rather, Petitioners focus on the "enterprise" element not considered by the District Court because the other necessary elements of a RICO claim were not sufficiently pled.

Contrary to Pro Se Petitioners' hypothesis, the Second Circuit cases cited by Petitioners do not suggest that a RICO cause of action can survive without pleading "sufficient facts to establish two predicate acts and adequately pleading a "pattern of racketeering activity." To the contrary, the *en banc* Court in *Indelicato* held that a pattern of racketeering requires proof of at least two predicate acts that are interrelated. *Indelicato* at 1382. The Second Circuit in *Weisman* held that a RICO cause of action requires that the pattern of predicate acts be done in the conduct of the affairs of the enterprise. *Weisman*, 624 F.2d at 1122. The Second Circuit's *Ianniello* decision held that an enterprise with "a single purpose," (in that case repeated and fraudulent skimming of profits from bars and restaurants owned by the *Ianniello* defendants) continuing indefinitely, can provide the basis for a Section 1962(c) violation. *Ianniello* at 191. There is no support in these Decisions for Pro Se Petitioners' theory that the "enterprise" element must be considered in the face of insufficient pleading of other necessary RICO elements.

There is no conflict between Second Circuit precedent and the reasoning of the Second Circuit's Decision affirming the District Court's dismissal of Pro Se Petitioners' Second Amended Complaint. Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

III. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH THIRD CIRCUIT PRECEDENT.

The third question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Plaintiffs' third version Civil Rico Complaint "conflicts" with the Third Circuit's decision in *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267 (1986). Pet. at *iii*.

Petitioners assert, without explanation, that the District Court's dismissal of the third version Complaint conflicts with the above-referenced Third Circuit opinion because the Court did not treat the criminal statute 18 U.S.C. § 2 (aiding and abetting) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Complaint. Pet. at 19. Pro Se Petitioners' argument, however, misconstrues the Third Circuit's opinion and is wrong.

Section 1961 of the RICO Act specifically lists those statutory violations considered RICO predicate acts. The Third Circuit's opinion in *United States v. Local 560 of the International Brotherhood of Teamsters* does not add another predicate act to those listed in Section 1961 and it

does not treat 18 U.S.C. § 2 as a RICO predicate. Rather, the Third Circuit decision affirmed that each individual Teamsters Local 560 Executive Board member was culpable for the extortion of that Local's memberships' rights because each aided and abetted in at least two "predicate acts." *Local 560 of the I.B.T.*, at 289. That opinion revealed numerous "predicate act" offenses adequately pled in support of the Government's case against the Provenzano Group's control of Teamsters Local 560. In contrast, the Pro Se Plaintiffs, in their third version civil RICO Complaint, failed to plead sufficient facts to support a finding of two predicate violations.

Contrary to the understanding of the Pro Se Petitioners, the Third Circuit's approval of the Government's application of the criminal statute 18 U.S.C. § 2 as an *additional* source of defendant culpability in the Teamsters Local 560 case does not transform that statute into a RICO "predicate act."

There is no error in the District Court's unwillingness to treat 18 U.S.C. § 2 as a RICO "predicate" in the context of the Pro Se Plaintiffs' Second Amended Complaint. Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict with the Third Circuit's treatment of 18 U.S.C. § 2 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

IV. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH THE SECOND CIRCUIT'S *UNITED STATES v. CONCEPCION* DECISION.

The fourth question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Petitioners' third version Civil Rico Complaint "conflicts" with the Second Circuit's en banc decision in *United States v. Concepcion*, 983 F.2d 369 (1993). Pet. at *iii*.

Petitioners assert, without explanation, that the District Court's dismissal of their Complaint conflicts with the above-referenced Second Circuit opinion because the Court did not treat 18 U.S.C. § 1959 (commission of violent crimes in furtherance of racketeering activity) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Compiaint. Pet. at 19.

However, Pro Se Petitioners misconstrue the Second Circuit's opinion in *Concepcion*. That opinion does not suggest that a breach of 18 U.S.C. § 1959 should be considered as a RICO Section 1961 "predicate act." Rather, the Second Circuit's opinion in *Concepcion* simply affirms that Section 1959 compliments a RICO prosecution. The *Concepcion* opinion provides that the government may prosecute under RICO for conduct that constitutes a pattern of racketeering activity in connection with an enterprise, *and additionally*, prosecute under 18 U.S.C. § 1959 for violent crimes intended to permit the defendant to maintain or increase his position in a RICO enterprise. *Concepcion*, at

381. Section 1959 is thus an additional prosecutorial tool available to combat racketeering activity. 18 U.S.C. § 1959 is not, as Petitioners suggest, a RICO predicate.

There is no error in the District Court's Decision in not considering 18 U.S.C. § 1959 as a RICO "predicate." Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict with the Second Circuit's treatment of 18 U.S.C. § 1959 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

V. THE SECOND CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PRO SE PETITIONERS' SECOND AMENDED COMPLAINT DOES NOT CONFLICT WITH ANY OF PLAINTIFFS' RIGHTS.

The fifth question presented by the Petition is whether the Second Circuit's affirmation of the District Court's dismissal of Pro Se Petitioners' third version civil Rico Complaint violated "the plaintiffs' statutory rights" because "29 U.S.C. § 530" was not treated by the court as a RICO predicate. Pet. at *iv.*

Pro se Petitioners assert that the District Court's dismissal of their third version civil RICO Complaint is violative of their rights and "is contrary to common sense" because the court did not treat 29 U.S.C. § 530 (deprivation of union rights by violence or threats of violence) as a "predicate act" for purposes of considering the sufficiency of their civil RICO Complaint. Pet. at 21. Pro Se Petitioners' argument hinges upon both their misunderstanding and

misrepresentation of 18 U.S.C. § 1961(1)(C) of the RICO statute. Petitioners misrepresent to the Court that Section 1961(C) provides that, "any act which is indictable under Title 29 U.S.C. Code" is properly a RICO predicate (Pet. at 22). Petitioners are wrong. Title 18 U.S.C. § 1961(C) defines RICO racketeering activity as: "*any act which is indictable under Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds*)." There is no authority either in the RICO statute or case law that provides that 29 U.S.C. § 530 is a RICO predicate.

There was no error in the District Court's not considering "29 U.S.C. § 530" as a RICO "predicate." Accordingly, the Second Circuit's Decision upholding the District Court's dismissal of the third version civil RICO Complaint does not present any conflict of law regarding the treatment of 29 U.S.C. § 530 in the RICO context. Therefore, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

VI. PETITIONERS' RIGHTS WERE NOT PREJUDICED BY THE JUDICIAL TREATMENT OF THE ISSUES RAISED IN THEIR PETITION.

The sixth question presented by the Petition is whether "the Second Circuit's panel of Hon. Chester J. Straub, Hon. Ralph K. Winter, and Hon. Thomas J. Meskill engaged in conduct prejudicial to the effective administration of justice". Pet. at *iv*.

In their sixth argument, Petitioners turn on the Court for not agreeing with their view of their RICO Complaint.

Petitioners accuse the Honorable District Court Judge Janet C. Hall of "flagrant misrepresentation," "intentional misidentification" of a Rule 59(e) Motion, "intentional concealment" and then "intentional misidentification of a Rule 60(b)(6) Motion." Pet. at *iv-v*.

Petitioners were not prejudiced in any way by the Court's treatment of their Motion for Reconsideration. The grounds for granting a reconsideration motion are limited to: (1) intervening changes in the law; (2) new evidence previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice. *Doe v. New York City Dep't of Social Services*, 709 F. Supp. 782 (S.D.N.Y. 1983). To obtain reconsideration the movant must point to controlling precedent or facts that could reasonably alter the conclusion of the court. *Schrader v. CSX Corp.*, 70 F.3d 255, 257 (2d Cir. 1995). None of these grounds were presented in the Pro Se's Motion for Reconsideration. Additionally, reconsideration is not appropriate to fill in gaps identified by the court. *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988). In this regard, Pro Se Petitioners' Motion for Reconsideration consisted in large part of the same misguided arguments they presented to the Second Circuit and repeat in the instant Pro Se Petition.

On July 11, 2000, the District Court dismissed Petitioners' claims against the Defendants in a well reasoned 40-page opinion. Pet. Supp. App. B1–B40.[4] The Second Circuit

4. The typographical errors that appear in the District Court's Ruling dated July 11, 2000 as reproduced in Petitioners' Supplemental Appendix do not appear in the original copy of the Ruling. In addition, some parts of the original Ruling are actually left out mid sentence. For one example, the last three sentences of footnote 2 should read,

(Cont'd)

correctly affirmed the District Court's dismissal of Petitioners' Second Amended Complaint because the Pro Se Petitioners had not established the elements of a RICO claim. The reasoning of the Ruling dismissing Pro Se Petitioners' Second Amended Complaint does not represent a conflict with any established RICO precedent, and Plaintiffs' rights were not in any way prejudiced.

(Cont'd)

> *Because allegations of a pattern of racketeering activity are a required part of a RICO action based on 18 U.S.C. § 1962(b),(c) and (d), the court must examine whether the plaintiffs have alleged sufficient facts to meet this requirement. If they have, the court would then further consider the nature of the enterprise, as plaintiffs suggest. If they have not alleged sufficient facts to meet the 'pattern' requirement, however, then the court would not reach the 'enterprise' issue and must dismiss the plaintiffs' complaint for failure to state a claim.*

For comparison see Petitioners' inarticulate reproduction at page B8 of the Supplemental Appendix.

CONCLUSION

Certiorari is not warranted. For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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